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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 578

LYSS D. LAMB, *Appellant,*

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA, *Appellees.*

Appeal From the District Court of Appeal of the State of California.

STATEMENT AS TO JURISDICTION.

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Appeal From the District Court of Appeal of the State of California.

STATEMENT AS TO JURISDICTION.

Appellant Lyss D. Lamb submits herewith his statement particularly disclosing the basis upon which this Court has jurisdiction on appeal to review the judgment of the Supreme Court of the State of California in 2nd Criminal Number 6864, denying Appellant's petition for hearing of his case wherein the Second Division, District Court of Appeal of the State of California affirmed the judgment of conviction of Appellant for the crimes of Conspiracy and Grand Theft.

The Opinion Below.

The opinion of the District Court of Appeal, Second Appellate Division, of the State of California has been reported and appears in the official reports of the State of California as Volume 204 Advance California Appellate Reports page 282; copies of the opinion are attached hereto as Appendix A.

Jurisdiction.

1. This is an appeal from a decision of the Supreme Court of the State of California refusing to grant a hearing in a case after the Second Appellate Division, District Court of Appeal of the State of California affirmed the Conviction of Appellant Lyss D. Lamb for the crimes of Conspiracy and Grand Theft. Appellant Lamb has been tried *en masse* with eight defendants in a jury trial over a two and one half month period; the indictment alleges the existence of a general conspiracy to defraud the McKesson & Robbins Co., a national concern during the period July 1955 to October, 1957.

2. Appellant was sentenced in the trial court on July 1, 1959; the date of the decision of the Appellate Court which is sought to be reviewed herein is May 29, 1962; Appellant's request for rehearing in the District Court of Appeal was denied on June 13, 1962; Appellant's petition for hearing before the California Supreme Court was denied on July 25, 1962. Notice of Appeal to this Court was filed by appellant with the Clerk of the District Court of Appeal of the State of California, the Court possessed of the record in this case, on September 6, 1962.

3. The Jurjsdiction of this Court upon appeal is conferred by 28 U. S. C. A. Section 1257(2). Appellant challenges the validity of the application of California Penal Code Section 1098, on the ground that, as applied to the mass trial below, it is repugnant to the Constitution of the United States; and the decision of the California Supreme Court, refused to hear the case when the District Court of Appeal, of

said state's decision was in favor of the validity of the statute.

4. Cases believed to sustain the jurisdiction of this Court on appeal include:

Sullivan v. Texas, 207 U. S. 416;

Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U. S. 157, 150.

(Where highest state court declines to exercise its authority, the judgment of the intermediate court rather than the order of refusal by the higher court is the judgment reviewable on appeal.)

Charleston Federal Savings & Loan Ass'n v. Alderson, 324 U. S. 182, 185-186.

(Where the opinion of the state court of last resort demonstrates that a state statute was drawn in question, as repugnant to the Constitution and the decision of the court was in favor of its validity, there is jurisdiction on appeal.)

In the case at hand the appellant maintained throughout the trial and all proceedings before the appellate courts of the State of California that he was being denied due process of law, in the mass conspiracy trial, under the federal constitution as interpreted by the United States Supreme Court (See Section hereafter on how the federal question was raised). During all stages of the proceedings Appellant's counsel asserted the claim to the federal right.

It was not until the filing of the opinion of the District Court of Appeal of the State of California, however, that the State statute, Penal Code Section 1098 was specifically applied in Appellant's case by the in-

termediate appellate court, as a justification for the mass trial. This was the first opportunity to raise the federal constitutional challenge to said statute itself. The constitutional challenge was immediately raised in the Appellant's Petition for Hearing before the California Supreme Court, wherein it was asserted that the state statute must yield to this Court's application of the due process rule of "variance" in conspiracy cases. Appellant stated:

> "In conspiracy cases the application of Penal Code Section . . . 1098, . . . conflicts with the guarantees of Due Process of Law under the *rule of Kotteakos v. United States* . . ." (Petition for Hearing, California Supreme Court, page 11.)

(See also Petition for Hearing, California Supreme Court, pages 5-10; 11-16; Petition for Rehearing calling to intermediate appellate courts attention that it failed to affirmatively discuss the federal question and this Court's decisions as raised in Appellant's briefs.)

Appellant respectfully submits that appeal jurisdiction exists in this case. In the event this honorable Court holds otherwise, appellant respectfully requests that the Court treat and consider this statement as a petition for writ of certiorari (pursuant to 28 U. S. C. Section 2103).

5. This Appeal raises the question of the constitutionality of the following provision of the California Penal Code: as applied in mass trials for criminal conspiracy.

> "When two or more defendants are jointly charged with any public offense, whether felony or mis-

demeanor, they must be tried jointly, unless the Court orders separate trials. In ordering separate trials, the Court in its discretion may order a separate trial as to one or more defendants, and a joint trial as to the others, or may order any number of the defendants to be tried at one trial, and any number of the others at different trials, or may order a separate trial for each defendant; provided, that where two or more persons can be jointly tried, the fact that separate accusatory pleadings were filed shall not prevent their joint trial."

California Penal Code, Sec. 1098.

Questions Presented.

I. Was Appellant deprived of due process of law under the Fourteenth Amendment of the Constitution of the United States when he was tried *en masse* over a two and one-half month period as one of eight defendants under an indictment alleging the existence, among the defendants, of one general overall criminal conspiracy; the trial being held pursuant to California Penal Code Section 1098, which provides:

"When two or more defendants are jointly charged with any public offense . . . they must be tried jointly, unless the Court orders separate trials."

where at trial the proof presented was at variance with the indictment in that it demonstrated, at most, the existence of a number of smaller conspiracies, rather than the general overall conspiracy charged?

II. Are the guarantees of due process of law under the Fourteenth Amendment of the United States Consti-

tution, as applicable to mass trials for criminal conspiracy in state courts, co-extensive with guarantees of fair trial in Federal criminal proceedings? If so, is California Penal Code Section 1098 unconstitutional when applied, as in Appellant's case, as justification for a mass conspiracy trial despite a variance between the indictment's charge of a general overall conspiracy, and proof at trial of multiple conspiracies, rather than the single one alleged?

Statement.

1. The Nature of the Case.

Under indictment by the Grand Jury of the County of Los Angeles, State of California, eight defendants including Appellant, Lyss D. Lamb, were brought to trial in the Superior Court of Los Angeles County. All defendants were charged in Count I of the indictment with the crime of Conspiracy (Section 182, subdivisions 1 and 4, California Penal Code), and variously joined with certain other of the defendants in separate charges of grand theft.

The conspiracy charge in the indictment alleged that all of the eight named defendants had joined in a criminal conspiracy, between the dates of July, 1955, and December, 1957, when they unlawfully conspired, combined, confederated and agreed together to falsify corporate records, commit grand theft, cheat and defraud, and obtain money and property by false pretenses.

The indictment alleged twenty separate overt acts in pursuance of said conspiracy, variously alleging that 1, 2, or at most 3 of the eight defendants committed crimes of grand theft or made fraudulent entries in cor-

porate records. In each instance the alleged victim was the McKesson & Robbins Company, a national concern.

Appellant Lyss D. Lamb was found guilty of the crime of conspiracy and the crime of grand theft of $3,275.00. On July 2, 1959, Appellant was sentenced, proceedings were suspended, probation was granted for a four year period, on the condition that Appellant spend three months in the County jail. The sentence is a felony sentence under California law with various further conditions of probation.

Appellant was arraigned upon the charges during the month of November, in 1958;

The trial of the eight defendants commenced early in 1959; it extended for fifty Court days, the Jury deliberated for seven days before reaching its decision.

Each defendant moved at various times prior to and during the trial for severance and for separate trials. All of said motions were denied by the trial Judge [Clk. Tr. pp. 42-44; Rep. Tr. pp. 3529-3534].

McKesson & Robbins is a national concern doing business in corporate form. The incidents concerned occurred within Los Angeles County in the State of California; the defendants involved in the indictment were the District Vice-President of the Southern Pacific District of the company, certain Division Managers of the Drug Division of the company, an accountant of the firm and two contractors, including Appellant, Lyss Duane Lamb, who is a general building contractor.

The gist of the alleged conspiracy was that the contractors would do work for the company billing the company for services that at times were never performed; after receiving money from the company for such fraud-

ulently alleged services the contractors in turn would give gratuities to the executives of McKesson & Robbins Company, including among other things, an alleged "gift" by appellant Lamb of a swimming pool with a value in excess of $6,000.00.

At the time of trial it was proven that defendant Ralph M. White, a modernization specialist with the company, had contacts with all of the eight defendants and made arrangements specifically with Appellant Lamb to make allegedly improper "gifts," with money fraudulently obtained from the McKesson & Robbins Company, unto the company executives Robert Gangwer and Cecil Blackhurst.

The prosecution proved *no* other connection between Appellant Lamb and any other members of the alleged conspiracy, nor did the prosecution seek to prove that appellant had done any work for any of the other corporate executives named with him in the conspiracy.

The evidence demonstrated that Appellant Lamb had contact with a central figure, Ralph M. White but had no contact, direct or indirect, with over one-half of the other alleged members of the conspiracy who dealt with other contractors through the central figure Ralph M. White. White affected and approved the improper gratuities allegedly fraudulently obtained from McKesson & Robbins Company.

Lamb consistently maintained his innocence and presented an extensive defense. His defense included presentation of bank records which tended to prove that the executive who received the swimming pool had actually paid for same in a legitimate business transaction. [Rep. Tr. pp. 3615-3616; 4374-4376 and 4379.]

The decision of the state appellate court below does not discuss this irreconcilable conflict in the facts. The opinion states that Appellant Lamb's part in the conspiracy involved a fraudulent transaction resulting in the theft of $1,093.81 from McKesson & Robbins to provide a carpet for a company executive (see Opinion, Appendix A p. 5). While the Court below interprets these facts to be Appellant Lamb's part in the conspiracy, the record conclusively establishes that the jury found the Appellant Lamb *not* guilty of the theft of this sum. [See Clk. Tr. p. 117, verdict; and Indictment Count I, Overt Acts, and Count XII, Clk. Tr. pp. 1-24.]

2. The Federal Challenge Was First Raised in the Trial Court.

Prior to the trial, Appellant Lamb, moved for a separate trial and severance for himself, which motion was denied [Clk. Tr. pp. 42-44].

During the trial upon motion to dismiss appellant Lyss D. Lamb's counsel, David Daar, moved for a severance [Rep. Tr. p. 3529] on the ground that appellant Lamb's rights had been substantially prejudiced by the joint trial and further moved for a mis-trial on the same ground and moved for dismissal of the charges each motion was based upon the principles enunciated by the United States Supreme Court in *Kotteakos v. United States*, 328 U. S. 750, 86 S. Ct. 1239 [Rep. Tr. p. 3533], and *Cancilla v. United States*, 157 F. 2d 470, and Lamb's counsel alleged:

> "I submit that if the Court permits the case to go to the jury as it stands now there would be a violation of due process as to Mr. Lamb under the *Cancilla* case and the *Kotteakos* case" [Rep. Tr. p. 3534].

Kotteakos v. United States, 328 U. S. 774, 90 L. Ed. 1571 is the decision of this Honorable United States Supreme Court which holds that each person *has a right not to be tried en masse* for the conglomeration of distinct and separate offenses committed by others. This Court recalled the dangers of transference of guilt among defendants in mass trials.

3. The Federal Challenge Was Also Raised in All State Appellate Courts.

Appellant Lamb raised the point presented by this Appeal in Point II of this opening brief on appeal to the District Court of Appeal, Second Appellate District, State of California (App. Op. Br. pp. 47-73, wherein Appellant Lamb challenged the conviction on the grounds of prejudice by fatal variance between the indictment's allegation of a single general conspiracy and the People's proof of many smaller alleged conspiracies).

The heretofore cited Decisions of this Honorable United States Supreme Court were presented and argued fully before the Appellate Court in the Opening Brief, Reply Brief (pp. 15-49) and during oral argument.

Throughout the proceedings in the Trial Court and at all stages of the Appeal before Appellate Courts of the State of California, Appellant Lamb contended that he had been prejudiced and denied his rights to due process of law under the principles expounded in the decisions of the United States Supreme Court heretofore cited, and others, wherein this Honorable Court ruled that it is prejudicial to substantial right to subject an individual to a mass trial when he has not

conspired *en masse* with the parties jointly charged within the general conspiracy.

In Appellant Lamb's Petition for Rehearing in the District Court of Appeal of the State of California, Appellant Lamb brought to the Court's attention the fact that it absolutely failed to consider whether or not appellant Lamb's rights were prejudiced by the fatal variance between the indictment's allegation of one general conspiracy and the proof of more than one conspiracy at the time of trial; again, calling the Court's attention to the United States Supreme Court's rule as set forth in *Kottcakos v. the United States*, 328 U. S. 750 stating that this is:

> "The prime question in the appeal of appellant Lamb." (Petition for Rehearing page 5.)

The entire argument was not considered in the Court's written Opinion. (Petition for Rehearing District Court of Appeal, Item 4, pages 4 through 5, inclusive.)

The Decision of the California District Court of Appeal for the first time in the proceedings justified the mass trial by applying California *Penal Code Section 1098*. The Appellate Court rejected each of the defendants' contentions that joining them all in one Jury Trial resulted in "a deprivation of due process." The Court relied upon said state statute which provides, as heretofore indicated, for joint trial of any defendants jointly charged unless the Court orders separate trials.

The Court held:

> "A reading of the section in full will indicate the broad discretion vested in the Court to order separate or joint trials. A review of the proceed-

ings before us indicates no abuse of this discretion. As pointed out in *People v. King*, 30 Cal App. 2d 185. . . .

"It is not an abuse of discretion to refuse to grant a motion for a severance because damaging testimony or the admission or confessions of a co-defendant might be admitted in evidence against such co-defendant and not be admissible against the moving defendant. . . ." (*People v. Lamb*, 204 A. C. A. 282). (See p. 10, Appendix A.)

In Appellant Lamb's Petition for Hearing before the Supreme Court of the State of California, appellant again raised the issue of a fatal variance between the indictment's allegation of one general conspiracy and the apparent proof at the time of trial of a number of smaller conspiracies and further challenged the Court's application for the first time of California *Penal Code* Section 1098 as a justification for the mass trial, specifically raising before the California Supreme Court, the challenge that "the application of California *Penal Code Section . . . 1098 . . .* (allowing the joinder of defendants in mass trial) conflicts with the guarantees of due process of law under the rule of *Kotteakos v. United States*, 328 U. S. 750", where experience at the trial itself demonstrates that there was actually no overall general conspiracy as alleged in the indictment which might provide a reason for a mass trial. Appellant argued that the rule against a variance, as expounded by this Court, must be paramount to the state statute. (See Petition for Hearing, California Supreme Court pp. 5-10; 11-16.)

The Petition for rehearing and hearing in the California Supreme Court have been denied.

Appellant raised the Federal question as to the constitutionality of California Penal Code Section 1098 as applied in his case immediately when the statute was presented as justification for the mass trial for the first time in the opinion of the California District Court of Appeal. However, throughout the trial and all other proceedings appellant asserted the same rights under the decisions of this court in challenging the mass trial as a denial of due process of law.

The Federal Questions Are Substantial.

This Court has enforced the guarantees of fair trial as applicable to mass conspiracy trials in Federal Courts; clearly defined safeguards for state proceedings, in such cases, have not been formulated. California justifies mass trials for Criminal Conspiracy by application of a State Statute leaving to the trial judge's discretion the ultimate determination of whether substantial rights will be denied by mass trial, despite a later failure to prove a single overall conspiracy among the alleged conspirators. This is a deprivation of due process of law under the Fourteenth Amendment.

The sole question raised is whether a state is bound to follow the federal rule enunciating the right of all persons to be free from mass trial for criminal conspiracy, without substantial justification by proof of an overall conspiracy among those charged.

In *Kotteakos v. United States*, 328 U. S. 750, 80 S. Ct. 1239, this Court recognized the dangers inherent in mass trials for conspiracy and held that the dangers

of transference of guilt from one defendant to another across the line separating conspiracies are so great that no one can say prejudice to substantial right has not taken place.

In federal trials the rule is clear that substantial injustice follows any conviction after a mass conspiracy trial, where it was charged that all defendants conspired in a single general conspiracy and at time of trial the evidence, at variance with the charge, demonstrated that there was no overall conspiracy, as alleged but rather a number of smaller criminal conspiracies. In such cases this court has held, in substance, that there is no way of determining that any one individual was not prejudiced by such a mass trial where evidence is received as to crimes he was not a part of.

In a case substantially similar to that of Appellant Lamb's, herein, this Court's decision in *Kotteakos v. United States*, 328 U. S. 750, reversed convictions in a federal court after a mass conspiracy trial where there appeared such a "variance" between the indictments allegation of a general conspiracy and proof of *more than one conspiracy* at the time of trial.

Appellant Lyss D. Lamb, herein, is a general building contractor who dealt principally with one employee of the McKesson & Robbins Company. The employee, Ralph M. White, would authorize Appellant to do work for the company and also perform services for certain company executives. Appellant thereby had dealings with three company executives but had no connection with nor any interest in work that was done for other executives by other contractors; one of them a plumber, was also joined in the mass trial.

All defendants had only one thing in common; they all dealt with Defendant Ralph M. White who approved all work upon company projects and made all arrangements for the allegedly illegal benefits given to the Company's executives by the contractors.

White plead guilty and testified for the prosecution.

Kottcakos v. United States, 328 U. S. 750, similarly was a mass conspiracy trial in which a United States Housing Administrator had had contact with all defendants joined in the mass trial; there was no connection between the defendants other than that they had each dealt with said government employee, one Simon Brown, who had fraudulently approved government loans made to each of them.

Brown pled guilty and testified for the prosecution.

This court held that since no connection was shown between the defendants although they all had a similar illegal object in dealing with Simon Brown to defraud the government, there was no single conspiracy as alleged in the indictment; rather, there were multiple smaller conspiracies proven at the trial. Thus, the right of each defendant not to be tried *en masse* had been violated. This Court held that each defendant had a right not to be tried *en masse* unless he had jointly engaged in a single overall conspiracy with the defendants with whom he was tried. This Court held that the dangers of mass trial are invited by anyone who conspires *en masse*, however, such dangers are not tolerable when, in fact, there has been no general conspiracy between the defendants jointly tried, but rather, at most, a number of smaller conspiracies. In such cases the dangers of mass trial are so great, guilt by

association and transference of guilt among the joined defendants so probable that the guarantees of fair trial are abridged.

The evidence at the trial in Appellant Lamb's case demonstrated that he did not conspire with all the defendants named; if he conspired at all, a fact he consistently denied, the evidence might sustain a conclusion that there were three or even four different conspiratorial groups with one central figure, Ralph M. White, common to all of them. It was he who had the power to approve the alleged illicit transactions.

Thus while this Court has established basic principles and guides for federal trials for mass criminal conspiracy, appellant submits, mass trials in State courts, such as California, proceed unchecked in violation of the Constitutional guarantees of due process of law, under the Fourteenth Amendment.

In the absence of positive statements to the contrary California has in the case at hand justified a mass trial for criminal conspiracy where Appellant Lamb was charged by indictment with having conspired in a general overall conspiracy with eight defendants, brought to trial under said Indictment, tried *en masse*, and convicted of the crimes of conspiracy and grand theft; even though the prosecutor failed to prove the existence of the general overall conspiracy charged in the indictment, proving at best the existence of a number of smaller conspiratorial groups.

Thereby the device of charging a single mass conspiracy among the defendants lead to their trial and conviction *en masse*, although some of them had never met, nor had they any interest in common; nor had they conspired together.

The decision of the California Court justifies the mass trial of the Appellant in the face of the Constitutional due process challenge by application of the State statute in question (Penal Code Section 1098 which provides in part):

> "When two or more defendants are jointly charged with any public offense . . . they must be tried jointly, unless the Court order separate trials. . . ."

The California appellate court holds that the trial judge, under the statute has a broad discretion in determining whether or not defendants will be tried *en masse* or separately, and that he has not abused that discretion; therefore the court concludes, due process of law has not been denied appellant.

The application of Section 1098 of the California Penal Code, as above, to the facts of appellant Lamb's case is violative of the due process clause of the Fourteenth Amendment of the United States Constitution, in that it leaves the test of whether due process of law has been served to the "discretion" of the trial judge. While this Court holds due process requires a determination of whether or not the mass trial was justified by proof of existence of mass conspiracy as alleged in the very indictment which was the basis for bringing the defendants to mass trial.

The California Court's sanctioning of Appellant's mass trial by application of the state statute leaving the determination to the discretion of the trial judge is consistent with a general state trend to uphold convictions after complex mass conspiracy trials although all defendants neither knew each other personally (see *People v. Drake*, 151 Cal. App. 2d 28, 38-39); nor knew of the existence of each other (*People v. Sherman*, 127 Cal. App. 2d 230); nor because damaging testimony or the admission or confessions of a codefendant might be admitted in evidence against such codefendant, and not be admissible against the moving defendant (see *People v. King*, 30 Cal. App. 2d 185, 206).

While the rules of procedural fair trial in mass criminal conspiracy trials have been established in Federal Courts, Appellant contends that application of the "discretionary" rule of the California statute herein challenged demonstrates the absence of clearly defined guides for assuring the guarantee of due process of law in mass criminal conspiracy trials in state courts.

The rule in such cases for federal courts is stated in *Kotteakos v. United States*, 328 U. S. 750, *the substantial federal question presented by appellant's case is: does the due process clause of the Fourteenth Amendment to the United States Constitution similarly guarantee to defendants in state courts the right not to be subjected to mass trial for criminal conspiracy unless in fact they have conspired en masse.*

Conclusion.

It is submitted that the application of the California statute, in this case, as justification for the mass trial was unconstitutional, that the statute is thereby unconstitutional, and that the questions presented by this appeal are substantial and of great public importance, for in their answer lies the very key to due process of law in criminal conspiracy trials, which trials are finding an ever expanding position in the prosecutor's arsenal as "The darling of the modern prosecutor's nursery" (Learned Hand, J. in *Harrison v. United States*, 7 F. 2d 259, 263 (2d Cir. 1925).)

Respectfully submitted.

DAVID DAAR,
Attorney for Appellant.

APPENDIX A.

Opinion of the District Court of Appeal.

In the District Court of Appeal of the State of California, Second Appellate District, Division Four.

The People of the State of California, Plaintiff and Respondent, vs. Lyss D. Lamb, Robert E. Gangwer, Sigmund C. Dembowski, Rollin B. Rucker and Eddie Oblas, Defendants and Appellants. 2d Crim. 6864.

Filed: May 29, 1962.

Appeal from a judgment of the Superior Court of Los Angeles County and from an order denying a new trial. Mark Brandler, Judge. Affirmed.

Prosecution for conspiracy to violate Corporations Code, section 3020(b), to commit grand theft, cheat and defraud by criminal means and obtain money and property by false pretenses. Judgments of conviction affirmed.

Wendell P. Hubbard for Defendant and Appellant Robert E. Gangwer; David Daar for defendant and appellant Lyss D. Lamb; Sigmund Dembowski, Rollin B. Rucker and Eddie Oblas, in pro per.

Stanley Mosk, Attorney General and Elizabeth Miller, Deputy Attorney General, for Plaintiff and Respondent.

This case involves an appeal from judgments of conviction of a number of local executive officers of a national concern and of certain contractors, all of whom it was charged conspired to commit grand theft and to cheat and defraud by criminal means. The victim, McKesson and Robbins, Inc., a corporation, herein

termed the "Company" engaged in the wholesale distribution of drugs, liquor and chemicals.

Defendant Rollin B. Rucker, district vice president of the Company's South Pacific District, comprising a number of divisions, was found guilty of count one, conspiracy.

Defendant Sigmund C. Dembowski, accountant for the North Hollywood division, was found guilty of count one, conspiracy, and of counts 8 and 15, grand theft.

Defendant Robert E. Gangwer, division manager of the North Hollywood division, was found guilty of count one, conspiracy, and of counts 3, 5, 7, 11 and 12, grand theft.

Defendant Cecil M. Blackhurst, division manager of the Long Beach division was found not guilty of count one, conspiracy.

Defendant Robert Clasen, operational manager of the North Hollywood division, was found guilty of count one, conspiracy, and of counts 6 and 9, grand theft.

Defendant Ralph M. White, a modernization specialist assigned to the various divisions where needed, pled guilty to count one, conspiracy, and count 19, grand theft.

Defendant Lyss D. Lamb, a general contractor, was found guilty of count one, conspiracy, and count 16, grand theft.

Defendant Eddie Oblas, a plumbing contractor, was found guilty of conspiracy in count one.

Defendants Gangwer, Rucker, Dembowski, Lamb, Clasen and Oblas each moved for a new trial. The motions were denied. From the orders denying their motions for new trial and from their judgments of conviction respectively, defendants Gangwer, Rucker, Dembowski, Lamb and Oblas appeal.

A summary of the factual situation presented in this lengthy trial is as follows:

Oblas and Lamb were among certain contractors called upon by the Company to do plumbing and general contracting for the company in its modernization program under which certain improvements were being made, from time to time in various drugstores served by the Company.

Defendant Rucker had overall supervision of the affairs of the Company in the district and defendant White had direct charge of the modernization program under Rucker's direction. The other defendants (other than the contractors named) were all executive officers in the various divisions. With the cooperation of Rucker, Dembowski, the accountant, and White, work was done from time to time at the homes of the various executives, the bills for which were included in bills for other work done by the contractors on various Company stores. In certain instances bills were put through against the Company without any work whatever having been done for the Company. In other instances, legitimate Company bills were padded to include items sold or work done for the benefit of the individual executives. In each instance the bills were approved by defendant White and by the accountant Dembowski.

Apparently, the mechanics for the subsequent looting of the Company had its inception in 1955. Rucker called White to his office and stated that he wanted to fix up the old office on the balcony of the building. The amount of the invoice was $704.12. Rucker complained to White that the amount was over the estimate that he had on it and that there was other work to be done in the room; that the amount charged would have to be covered within the local organization. White and Rucker agreed it would be charged to the modernization department. White placed his initials on the back of the invoice. White took the bill to Dembowski, the accountant, and told him it was the invoice covering the room on the balcony and that Rucker had agreed that it would be charged to the modernization department. Dembowski asked how this was to be done and White replied "I don't know, you are the accountant." Dembowski said it could not be charged to the department, but would have to be charged to one of White's modernization accounts on one of the drugstores if he wanted to cover up the bill. White said "Mr. Rucker wanted it taken care of, so let's take care of it." The job was charged to the D and D Drug Company at Redondo Beach and the Company paid the $704.12.

In 1950, the cost of painting defendant Gangwer's house, amounting to $480.00 was included with the cost of the painting of a Company warehouse. The total for the two jobs was $1,221.80, for which the painting contractor received a Company check. One of the signers thereof was Gangwer.

In 1950, a bill for $711.07 for the installation of some lighting around Gangwer's home was included

with a bill for $14.03 for work done on a Company warehouse, which was paid for by Company check. In 1956, an all electric kitchen was installed in Gangwer's home, together with certain cabinet work. The cost was split up into two purchase orders of $685.00 and $91.20, one item being charged for the modernization program for one drugstore and the other item being charged to a second drugstore and paid for by the Company.

In 1957, certain electric lights and other installations were installed in Gangwer's home totaling $1,115.61. This work was charged to a job on Chevy Chase Pharmacy, and paid for by the Company. Also, in 1957, certain cabinet work and plumbing was installed in Gangwer's house and charged to a drugstore with the total cost of $677.25 being paid for by the Company. In that same year Gangwer had certain carpeting laid over foam rubber in his home at a total cost of $1,468.81, only $500.00 of which was paid for by Gangwer himself. White spoke to Gangwer about the bill and Gangwer said "Go ahead and pay it." White called defendant Lamb, the contractor, and asked if he would be willing to take Gangwer's bill and pay it and they would give Lamb a purchase order on work supposedly done on a drugstore to cover the cost of it. Lamb advised White he would handle the bill, but wanted a ten percent override on the amount of the bill. With this understanding the remainder of the cost of the carpeting, $968.81, was covered by Lamb through a Company purchase order "for plans and engineering on building for Adam Square Pharmacy, Glendale, in the amount of $1,093.81" and with supporting invoices it was approved and paid.

In 1957 an all electric kitchen and other improvements were installed in the home of defendant Dembowski, the accountant, the cost of which was charged to the Company with White's approval. A check for $400.00 signed by Dembowski and charged to the Company was paid to an electrical supply company. In this same transaction an additional $850.59 for work in Dembowski's home was charged to a drugstore account in Nevada and paid for by the Company.

Mr. Mulherin, a certified public accountant, was retained by the Company to conduct an investigation in 1957. He testified that he asked defendants Gangwer, Dembowski and Rucker individually concerning personal items which had been paid for by the Company such as lighting, plumbing, cabinet work and carpeting for Gangwer, stoves and electrical work for Dembowski, house painting and installation of a soda fountain, barbecue and television tables for Rucker. He said that in each instance these defendants admitted having received the services and materials without personal charge to them. In general, their responses indicated that they had rationalized the receipt of these benefits as being gratuities from grateful contractors regularly engaged by the Company in its modernization program.

The Company's investigator, Mr. Mulherin testified that he asked defendant Lamb concerning the invoices for work done by the latter for individual defendants but billed to the Company. He stated that Lamb responded that he had done the work represented in each of the invoices and that he did not know how defendant White handled the charging and payment for the

work. Lamb asserted that he would bill the work as instructed by White. Lamb further stated to Mr. Mulherin that he had delivered sums of money to defendant White from time to time and had recouped them through invoices rendered by subcontractors to the Company.

In December, 1957, Mr. Reitz, an employee of the Company had a conversation with defendant Oblas, the other contractor who was prosecuted in this proceeding. Oblas acknowledged that certain paid invoices taken from the files of the company were his; that the work described in the invoices had been done by him but not always at the particular drugstores whose names were written on the face of the invoices; that most of the particular invoices covered work done at the homes of defendants Gangwer and Rucker, officers of the Company; that he had received instructions on each one of the transactions, either from White or Gangwer as to how to bill the invoices.

On January 3, 1958, Mr. Mulherin and Mr. Reitz had another conversation with defendant Oblas. Oblas handed a document to them which read as follows:

"Plumbing work done at Mr. Rucker's house.

Total	$2,881.00
Plumbing work done at Mr. Lothrop's house	
Total	2,345.00
Plumbing work done at Mr. Rogers' house	
Total	840.00
Plumbing work done at Mr. B. Gangwer.	
Total	4,494.17
	$10,580.17"

The document further shows orders were received from defendant White and paid by Company check; none of the work was paid for by the officers themselves other than $150.00 by Lothrop.

Each of the appealing defendants contends the indictment fails to set forth acts or omissions constituting a public offense. They assert that Penal Code section 952 is unconstitutional in that it denies procedural due process. These contentions are without merit.

A comparison of the indictment before us with that considered by the court in the cases herein cited will indicate that the indictment fulfilled the requirements of the law and was clearly sufficient. The essentials of a valid accusation are commented on in *People v. Gordon*, 71 Cal. App. 2d 600, 610-611: "Under our simplified forms of criminal pleading it is not necessary to detail the act which each of the conspirators is to perform in the execution of the enterprise. (Citing cases.) . . . The pleading is sufficient if it sets forth in intelligible language a notice of the offense to be charged. The accused is not entitled to the description of the 'particular circumstances thereof' which he may get from his copy of the testimony given before the grand jury or the committing magistrate and furnished to him." (Citing case and code section.)

"The gist of the crime of conspiracy is the unlawful agreement to commit a crime and an overt act done in furtherance of the agreement. (Citing case.) No indictment is insufficient by reason of any defect or imperfection of its form so long as no substantial right of the accused is prejudiced upon the merits of the case. (Pen. Code section 960.) Section 952, Penal

Code, as amended in 1927 provides that it shall be sufficient if its language gives notice to the accused of the offense charged against him. (Citing case.) The validity of an indictment cannot be questioned when drawn in ordinary and concise language accusing the defendant of a specific public offense, omitting details, so long as he is furnished with a copy of the accusatory testimony. (Citing case.) The form of indictment is not important so long as it presents in sufficient substance the facts constituting the crime charged and it makes no difference whether the indictment be regarded "substantially and actually as a charge of substantive crime or as a charge of conspiracy. (Citing case.)"

In asserting that Penal Code section 952 is unconstitutional the burden is upon the defendants to show herein such section denies "procedural due process." As stated in *People v. Black*, 45 Cal. App. 2d 87, 96: "One who seeks to raise a constitutional question must show that his rights are affected injuriously by the law which he attacks and that he is actually aggrieved by its operation. (Citing cases.)"

In count one of the indictment before us twenty separate overt acts are alleged to have been committed in furtherance of the conspiracy. The evidence adduced sustains the charge of conspiracy as having been participated in by all of the defendants.

As noted in *People v. Kobey*, 105 Cal. App. 2d 548, 562, "Virtually the only method by which a conspiracy can be proved is by circumstantial evidence—the actions of the parties as they bear upon the common design. It is not necessary to show directly that the parties

actually closeted themselves, attained the proverbial meeting of the minds and agreed to undertake the unlawful acts.' (Citing case.) It is a familiar principle of the law that in deriving whether an agreement was unlawful the triers of the fact may consider the events that occurred 'at or before' or 'subsequent' to the formation of the agreement. From the proof of the occurrences beforehand and at the time of the agreement linked with evidence of the overt acts a jury may determine that a criminal conspiracy was formed. (Citing cases.) The major portion of the evidence might consist of the conversations and writings of the conspirators or it may consist of the overt acts done pursuant to the conspiracy."

Defendants further contend that the joining of all of them in one jury trial resulted in a deprivation of due process and was inconsistent with Penal Code sections 954 and 1098. With this we disagree. Penal Code section 954 reads in part: "An accusatory pleading may charge two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes or offenses, under separate counts, and if two or more accusatory pleadings are filed in such cases in the same court, the court may order them to be consolidated. The prosecution is not required to elect between the different offenses or counts set forth in the accusatory pleading, but the defendant may be convicted of any number of the offenses charged, and each offense of which the defendant is convicted must be stated in the verdict or the finding of the court. . . ."

Section 1098 of the Penal Code reads in part: "When two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly, unless the court order separate trials." A reading of the section in full will indicate the broad discretion vested in the court to order separate or joint trials. A review of the proceedings before us indicates no abuse of that discretion. As pointed out in *People v. Kim*, 30 Cal. App. 2d 185, 206, "It is not an abuse of discretion to refuse to grant a motion for a severance because damaging testimony or the admission or confessions of a codefendant might be admitted in evidence against such codefendant, and not be admissible against the moving defendant. (Citing cases.)"

Defendants also contend that the verdict was based upon the uncorroborated testimony of accomplices. The testimony of defendant White concerning the conspiracy and the activities of its members was corroborated by the records of the Company; also, by the testimony of contractors and suppliers, in addition to those who were prosecuted in the case, who furnished the various improvements and materials. There was further evidence by the defendants themselves that they did in fact receive the improvements and did not pay for them. From all of this evidence it can be seen that the verdicts of the jury were not based upon the uncorroborated testimony of accomplices.

Defendants next contend the evidence was insufficient to support the verdicts. This contention is also without merit. The crimes involved here continued over a long period of time, they followed the same gen-

eral pattern and from time to time other employees were asked to join the operation. Defendants White, Rueker, Gangwer and Dembowski held executive positions with the Company, of which they took advantage. They falsely represented that work and materials had been furnished to the Company in the modernization program. They falsified entries in the Company's books, indicated therein that improvements had been made in various drugstores which in fact had not been done. They charged the Company for services, improvements and materials, from which only the officers themselves had benefited. The jury was entirely justified in its finding that a conspiracy existed among these officers and contractors to cheat and defraud the Company.

Clearly the evidence adduced in the case at bar meets all the tests laid down by the Supreme Court in *People v. Massey*, 151 Cal. App. 2d 623, 652: "From the very nature of the stealth generally involved in the crime of conspiracy, it is not necessary to prove that the parties came together and reached a formal agreement. (Citing case.) In cases such as the one now engaging our attention, involving as it does, the claim of a conspiracy to defraud, it can hardly be expected that direct evidence of such a conspiracy can be obtained because such evidence could ordinarily be secured only in the event one of the conspirators admitted guilt. . . . The law recognizes the intrinsic difficulty of proving a conspiracy. The allegations with reference to conspiracy are treated as matters of inducement leading up to a more particular description of the acts from which conspiracy may be inferred. . . . *The conspiracy may sometimes be inferred from the nature of the acts done, the relation of the parties, the interests of the*

alleged conspirators, and other circumstances.' . . . . '(T)he purpose of the evidence in conspiracy cases is to establish a mental state—an illicit concord of minds of several persons. The jury is entitled to consider every fact which has a bearing on the ultimate fact in issue. There is no valid objection to evidence which tends to show, step by step, the gradual formation of a criminal concord in the minds of those accused, merely because the evidence begins at a time long anterior to the wrongful meeting of the minds. "It is necessary only that the evidence, in all its parts, tends to prove the formation of the conspiracy. . . . . 'From the nature of the crime itself it is difficult to prove a criminal conspiracy by direct evidence, and such conspiracies are almost always proven by circumstantial and "piecemeal" evidence . . . (Citing cases.)"

Defendants further contend the court erred in failing to pass fully upon the motions for a new trial, however, where the evidence in a criminal proceeding is amply sufficient to sustain the verdict a motion for new trial for lack of proper evidence is properly denied (*People v. Curry*, 103 Cal. 548.)

Defendants also contend the court erred in giving and refusing certain instructions. A review of all of the instructions given and of those refused shows no error. The situation here is as was stated in *People v. Steccone*, 30 Cal. 2d 234, 240: "The requested instructions were either covered in substance by the instructions given or failed to state correctly the proposition of law involved, and as so classified, no purpose would be served in discussing them separately as listed by appellant."

A review of the entire record of this lengthy trial discloses that the trial court fully, fairly and clearly instructed the jury upon all of the legal points involved.

Defendants further contend that the prosecutor was guilty of prejudicial misconduct both in his opening and closing arguments to the jury. The latitude allowed the prosecutor in argument is stated in *People v. Mason*, 184 Cal. App. 2d 317, 364: "A prosecuting attorney has a wide range in which to state his views as to what the evidence shows and the conclusions to be drawn therefrom (Citing case) and he may comment as to the manner in which a witness testifies. (Citing case.)"

We have reviewed the arguments of the deputy district attorney in this case and find that they did not exceed the permissible bounds.

The order denying the motions for a new trial and the judgments of conviction appealed from are affirmed.

Jefferson, J.

We concur:

Burke, P. J.

Balthis, J.

APPENDIX B.

Minutes.

In the Superior Court of the State of California, in and for the County of Los Angeles.

Department No. 100.

July 1, 1959. Present Hon. Mark Brandler, Judge.

The People of the State of California, vs. Lyss D. Lamb, 208509.

Deputy District Attorneys James G. Kolts and John Howard and the Defendant with counsel, David Daar; Present. Counts 1 and 10, CONCURRENT: Proceedings suspended. Probation granted for four years.

Spend first 3 months in County jail.

Pay any judgment arising out of this matter, when it becomes final in such amounts and manner as Probation Officer shall prescribe.

Seek and maintain employment as approved by Probation Officer.

Maintain residence as approved by Probation Officer.

Obey all laws, orders and rules and regulations of Probation Department and of the Court.

Remanded. Bail exonerated. Notice of Appeal is filed. A stay of execution pending appeal is granted. Bail on appeal is fixed at $2,000. Bond on appeal is posted and defendant is released.